Mary Bridge Children's Hospital and Health Care Center, a Division of Multicare Medical Center *and* United Staff Nurses Union, Local 141, United Food and Commercial Workers International Union, AFL–CIO, CLC. Case 19–CA–21238

November 8, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On July 12, 1991, Administrative Law Judge Richard J. Boyce issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Daniel R. Sanders, Esq., for the General Counsel.
Kathleen A. Anamosa, Esq., of Seattle, Washington, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge. I heard this matter in Seattle, Washington, on May 7, 1991. The complaint, arising from a charge filed by United Staff Nurses Union, Local 141, United Food and Commercial Workers International Union, AFL–CIO, CLC (Union) alleges that Mary Bridge Children's Hospital and Health Care Center, a Division of Multicare Medical Center (Respondent) has violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act) since about September 24, 1990, ''by fail[ing] and refus[ing] to execute a written contract embodying'' a collective-bargaining agreement reached by it and the Union on about August 29, 1990.[1]

[1] The charge was filed on November 29, 1990. The complaint issued on January 8, 1991.

Respondent alleges in its answer that it and the Union had not reached agreement because of a mutual mistake concerning night-shift bonuses.

I. JURISDICTION/LABOR ORGANIZATION

Respondent, a Washington corporation, operates an acute care hospital in Tacoma. The pleadings establish and I conclude that it is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) and a health care institution within Section 2(14) of the Act.

The pleadings also establish and I conclude that the Union is a labor organization within Section 2(5) of the Act.

II. THE ALLEGED MISCONDUCT

A. *Evidence*

On February 14, 1990, the Regional Director certified the Union as the collective-bargaining representative of Respondent's employees in this unit:

> All registered nurses employed by Respondent as regular full-time and part-time staff nurses, excluding supervisory and managerial employees assigned to Nursing Administration, and all other employees.[2]

Respondent's staff nurses previously had been represented by the Washington State Nurses Association (WSNA). The last bargaining contract between Respondent and WSNA ran from January 1, 1988, through December 31, 1989.

The first negotiating session between Respondent and the Union occurred on May 15, 1990. Respondent's chief negotiator was David Gravrock, a labor relations consultant for many years whose clientele consists primarily of healthcare providers. The Union's principal negotiator was Sharon Ness, a business representative since July 1989 and previously a WSNA labor-relations specialist for 2-1/2 years.

The Union's initial proposal, presented on May 15, was modeled after the 1988–1989 WSNA contract. That portion of the proposal pertaining to night-shift bonuses did not deviate from the WSNA contract in any now-relevant respect. Ness testified, ''The nurses felt that it was a good program and they wanted to maintain it.'' Gravrock recalled that, with a ''single exception'' of no present moment, the Union was ''agreeing to continue the prior night-shift bonus as it was.''

Appendix A of the 1988–1989 WSNA contract, incorporated in the Union's proposal, provided:

> 7. A special night shift ''bonus'' will be calculated and added to the base rate of pay (including certification pay) and shift differential as follows:
>
> Base Rate of Pay + Night Shift Differential + Night Shift Bonus Pay = ''Total Rate of Pay'' for Working Night Shift.

Neither the Union's proposal nor the WSNA contract from which it emanated set forth the formula for calculating night-shift bonuses. Moreover, Ness admittedly did not know the formula when the Union advanced this proposal.

[2] The pleadings establish and I conclude that this is an appropriate unit for purposes of the Act.

Subsequent bargaining sessions took place on the 7th, 15th, and 21st of June, July 25, August 9, and August 23–24. The parties specifically addressed the matter of night-shift bonuses in the June 21 meeting, and, after some jockeying, agreed to retain the relevant features of Respondent's arrangement with WSNA. So doing, they did not discuss the formula for calculating the bonuses; and the language agreed on, following the lead of the WSNA contract, did not provide any guidance.

The parties began the August 23–24 session, attended by a Federal mediator, by identifying those issues still open. Night-shift bonuses was not among them. During this session, however, Ness asked how the bonuses were figured. Her only object, evidently, was clarification. The record does not indicate, nor does anyone contend, that this signified an intent to reopen the issue.[3] Gravrock replied, after a caucus, with this formula:

> Multiply the base rate by 40 (hours) to obtain ''X.'' Divide ''X'' by 32 (hours) to obtain ''Y.'' ''Y'' minus the base rate equals the night-shift bonus.

Gravrock then ''plugged in numbers'' by way of example, and the discussion presently moved to other areas.

Gravrock testified that he had ''no idea'' how the bonus was calculated, but that Joy Follis, Respondent's director of human resources and a member of its negotiating team, ''felt that'' she did. Gravrock continued: ''So, during the caucus, we developed this formula that we believed was an accurate reflection of . . . how it was being paid.'' Gravrock did not mean to depart from the past practice and Ness assumed that he had articulated ''the formula [Respondent] was using . . . under the WSNA contract.''

Gravrock's articulation and Ness' assumption were mistaken. The formula under the WSNA contract had been this:

> Multiply the base rate by 40 (hours) to obtain ''X.'' Divide ''X'' by 32 (hours) to obtain ''Y.'' ''Y'' minus the sum of the base rate *and the shift differential* equals the night-shift bonus.

Thus, the larger the shift differential under the past practice, the less the night-shift bonus. Article 9 of the 1988–1989 WSNA contract provided for hourly shift differentials of $1 and $1.50, respectively, for second (3–11 p.m.) and third (11 p.m.–7 a.m.) shifts. The parties agreed in the negotiations in question to increase those amounts to $1.50 for the second shift and $1.70 for the third, then to $2 for both as of January 13, 1991.

The August 23–24 session ended with the Union neither accepting nor rejecting Respondent's latest proposed contract, which included their various understandings to that point. The Union agreed, however, to submit it, without recommendation, to a membership ratification vote the next week; and to accept the outcome of that vote. The proposal, if ratified, was to go into effect, retroactively, on August 26.

Ratification followed on August 29. Gravrock supplied the proposed contract that the Union presented to the members. Its Appendix A included this footnote, echoing his August 23–24 verbalization of the bonus-pay formula:[4]

> *Note*: Formula for determining ''Night Shift Bonus Pay'':
>
> Base Rate x 40 hours = X - 32 hours = Y
> Y - Base Rate = ''Night Shift Bonus Pay''

On August 31, Gravrock sent several copies of the contract as ratified to the Union for signing. Ness and two other union officials signed it, and Ness returned it to Gravrock, to be signed by Respondent, under cover dated September 24. Ness still believed ''the formula . . . included in the document . . . was the formula that had been used under the WSNA contract.'' Gravrock forwarded the contract to Respondent on October 2.

Respondent meanwhile began complying with the new contract in all respects but one: Apparently heedless of the Appendix A footnote, it continued to calculate night-shift bonuses as it had under the WSNA contract. One of the Union's business representatives, Kathleen Erskine, after conferring with Ness, consequently filed a grievance against Respondent on September 4, alleging that those ''eligible for the Night Shift Bonus'' had not been receiving

> the appropriate amount of pay in violation of . . . Articles 9 and 10 and Appendix A of the current labor agreement, and in violation of . . . Articles 8 and 9 and Appendix A of the wages, hours, and working conditions set forth in the labor agreement between [WSNA] and [Respondent].

The grievance added:

> In calculating the appropriate rate of pay for night shift nurses, the hospital has omitted the Night Shift Differential. The appropriate calculation is: Base rate of pay + Night Shift Differential + Night Shift Bonus Pay = Total Rate of Pay.

Respondent's house labor counsel, William Greenheck, replied by letter dated September 17, stating in part:

> I presume this grievance stems from the calculation that was given to the union's negotiating team when they asked for clarification as to how the bonus was being calculated. In reviewing my notes of 8/23/90, it appears we mistakenly provided incorrect information that

[3] Ness testified that she prefaced her question with the statement that the nurses ''didn't know how to figure the formula''; that some of the nurses had complained that ''every time the shift differential went up, the night bonus went down''; and that she ''needed a formula for figuring it out'' to ensure against ''having a loss.'' Gravrock testified, on the other hand, that Ness did not explain why she asked the question. Gravrock impressed me as the more forthright of the two. I credit him.

[4] Gravrock testified: ''[M]y recollection is that [Ness] had indicated that it would be a good idea to include that little formula we had provided her in the contract, as it would help cure any misunderstandings. . . . I think I said, 'Fine.' . . . [I]t seemed to me to be logical to include it in the agreement because . . . a question had been raised, and for purposes of clarity it seemed to make sense.''

> evening. We apologize for any inconvenience this may have caused.[5]

Greenheck enclosed a February 10, 1987 letter to WSNA's Kathy Cunningham from Russ Keefer, Respondent's director of compensation and benefits, ''which explains how the bonus is calculated,'' and a January 1, 1987 staff memorandum from Shirley Murphy, Respondent's associate nursing administrator, ''regarding this subject.''

Ness testified that she was not aware of Greenheck's September 17 letter when she returned the signed contract to Gravrock on September 24.

On October 11, Ness and Erskine met with Greenheck over the grievance. Greenheck then discovered that Gravrock's formulation had been incorporated in the contract, and that the Union had signed and returned it to Gravrock. Greenheck testified that he had assumed, going into this meeting, that the Union was concerned that Respondent was not ''paying in accordance with the correct formula''—that is, the one applied under the WSNA contract. He continued:

> I quickly learned that, no, they weren't claiming that we weren't paying in accordance with the correct formula, but that . . . they basically were wanting the incorrect formula, to hold us to it essentially.

Greenheck responded that he ''didn't think that was going to be acceptable,'' but that he would confer with his ''boss'' and ''get back with'' the Union.

Upon receipt of the union-signed contract, and before itself signing, Respondent replaced the Appendix A footnote with this:

> *Note*: Formula for determining ''Night Shift Bonus Pay'':
>
> See Keefer letter to Cunningham dated February 10, 1987, and Murphy memorandum dated January 1, 1987.

Greenheck sent the Union copies of the contract, signed by Respondent as thus changed, under cover dated November 14. His cover letter stated in part:

> We hereby expressly revoke the incorrect calculation for the Night Shift Bonus contained in Appendix A, which was implicitly revoked by my letter to you dated September 17, 1990. We have deleted the incorrect formula for calculation of the Night Shift Bonus. In its place we reference the attachments to my letter of September 17, 1990, which set forth the correct formula.

Ness replied by letter dated November 17, stating:

> The signed labor agreements you sent to us are unacceptable as the language agreed upon by the parties had been altered.
>
> Enclosed for signature . . . are two original copies of the labor agreement . . . containing the terms and conditions agreed upon between the parties.
>
> Please returned these signed original contract[s] to me no later than Monday, November 26, 1990.

Respondent did not comply; and, as earlier noted, the Union filed the present charge on November 29.

B. *Conclusion*

Summarizing:

(a) The Union's initial proposal borrowed in relevant part from the WSNA contract.

(b) The weight of evidence leaves no doubt that the parties' June 21 accord on the issue of night-shift bonuses was attended by a mutual if unspoken supposition that the WSNA formula would carry over.

(c) The issue was not identified, during the August 23–24 bargaining session, as among those still open; and, when Ness asked during that session how the bonuses were figured, she was seeking clarification and not contemplating its being reopened.

(d) Gravrock did not intend to depart from the WSNA formula when replying to Ness' query, and neither was aware until days later that he had.[6]

(e) The document Respondent provided the Union for ratification and postratification signing incorporated Gravrock's erroneous formulation.

(f) The weight of evidence establishes that both Respondent and the Union continued to believe, until well after the intended implementation of the would-be contract, that it incorporated the WSNA formula.[7]

(g) Before the Union signed and returned the contract as ratified, Respondent discovered and advised it of the mistake, and subsequently endeavored to reform the contract to conform with the parties' undoubted intent all along—to adhere to the established formula.

One might well conclude that the contract as ratified was enforceable. Gravrock's August 23–24 articulation of the formula, while mistaken, was unambiguous. The formulation in the document Respondent provided for ratification and then for signing at once corresponded with Gravrock's formulation and likewise was unambiguous. In an objective sense, then, a meeting of minds did occur.

Subjectively speaking, on the other hand, neither Respondent nor the Union intended a departure from the WSNA formula. In addition, the Union gave up nothing in exchange for Respondent's unwitting ''concession'' in this regard, and Respondent advised the Union of the mistake before the Union signed and returned the contract document. Further, Respondent would realize substantial economic detriment and certain of the unit employees a corresponding windfall should Respondent be held to the mutually unintended result, and the record contains no hint that the Union or the employees would suffer particular hardship or prejudice, apart from

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[5] Greenheck ''sat in on'' the August 23–24 bargaining session. He had been hired only a few days before, however, and was not knowledgeable about the night-shift bonus.

[6] Gravrock was aware, however, that he had ''no idea'' how the bonus was calculated, and relied on another member of the Union's negotiating team, who ''felt that'' she knew.

[7] Thus, Respondent continued to calculate the bonuses as it always had; the Union's September 4 grievance expressly charged Respondent with violating both ''the current labor agreement'' and the predecessor WSNA contract; and Ness admittedly believed, when she returned the signed contract on September 24, that the formula embodied in it was that ''used under the WSNA contract.''

the lost windfall, if Respondent were relieved of the consequences of the mistake.

I am persuaded that the latter considerations predominate, and that Respondent consequently did not violate the Act by refusing to sign a contract containing the disputed formula. Quoting from Corbin, *Contracts*, § 606 p. 655 (1951):

> If a written contract . . . is so drawn as not to correspond with the proved intention of the parties, the one who would be benefited by the error will not be permitted to enjoy these benefits. This is true, irrespective of the negligence in the drafting.[8]

Similarly, the Restatement, *Contracts* 2d, § 152(1) (1981), provides:

> Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in sec. 154.[9]

To like effect, the Restatement, *Contracts*, § 500 (1932), states in comment ''c'':

> A mistake may arise *with reference to the original agreement of the parties*, or with reference to the performance of a contract. Thus, *when making their original bargain, the parties either may have used the name Blackacre in contracting, on the assumption that it was the designation of Whiteacre*; or by their original contract they may have correctly stated that Whiteacre was the subject of the bargain and thereafter a conveyance of Blackacre may have been made and accepted in supposed performance of the contract. . . . [W]hether the original contract or the performance of it is reformed or rescinded, *in both cases a bargain which the parties made is set aside*. [Emphasis added.]

And Section 504 of the 1932 Restatement notes:

> [W]here both parties have an identical intention as to the terms to be embodied in a proposed . . . contract . . . and a writing executed by them is materially at variance with that intention, either party can get a decree that the writing shall be reformed so that it shall express the intention of the parties . . . .

See also *Americana Healthcare Center*, 273 NLRB 1728 (1985), in which the Board adopted this observation by the judge at 1733:

> [W]here a written agreement is not in conformity with the actual intention of the parties, a court of equity will reform the writing in accordance with that intention.

Finally, that Respondent's negligence underlay the mistake in question does not preclude its avoiding the consequences unless, which the record does not reveal, the Union changed position significantly in reliance on the ostensible bargain. Corbin, supra, § 609 p. 684; Corbin, *Contracts*, Supplement Part I, § 609 p. 859 (1989).

See generally *Waldon, Inc*., 282 NLRB 583, 585–586 (1986); *Globe-Union*, 245 NLRB 145, 147 (1979); *Apache Powder Co*., 223 NLRB 191, 195 (1976).

Conclusion of Law

Respondent has not violated the Act as alleged.

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended[10]

ORDER

The complaint is dismissed.

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[8] Corbin observes variously in sec. 608 that ''the law of mistake as it actually works . . . is not capable of being reduced to any broad single doctrine'' (p. 672); that ''every attempt at a generalization or stated rule must take into account a variety of factors and must be limited to some particular combination of them'' (p. 674); that, despite the oft-stated assertion that a contract can be avoided only in the event of mutual mistake, this ''broad generalization is misleading and untrue'' (p. 669); and that decisions affording relief in instances of unilateral mistake ''are too numerous and too appealing to the sense of justice to be disregarded'' (p. 675).

Corbin's 1989 Supplement, pt. I sec. 608, adds at p. 853 that ''it is not useful to classify mistakes as unilateral and mutual,'' that ''courts should try to protect the relatively innocent party from loss while not allowing him a windfall,'' and that ''fairness is best served by weighing the circumstances surrounding the mistake rather than applying a mechanical rule.''

[9] Sec. 154 of the Restatement states in relevant part: ''A party bears the risk of a mistake when . . . (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient.'' Although Gravrock himself had ''no idea'' how the bonus was calculated, this exception does not apply inasmuch as he relied on Respondent's director of human resources, who thought she knew. Thus, Respondent did not proceed with an awareness that its knowledge was limited.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.